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No. 71-914

In the Supreme Court of the United States

OCTOBER TERM, 1971

IRVING BRAVER AND MORTON LEHRER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 450 F. 2d 799.

JURISDICTION

The judgment of the court of appeals was entered on October 28, 1971. A petition for rehearing was denied on November 24, 1971. Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to January 14, 1972, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

459-149—72

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals properly approved an instruction relating to burden of proof on the issue of entrapment, although it suggested a simplification of the instruction in future cases.

STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York, petitioners were convicted of bribing an Internal Revenue Service agent and of conspiracy, in violation of 18 U.S.C. 201(b) and 371. Each was sentenced on the conspiracy count to six months' imprisonment and a $10,000 fine, and on the substantive count to a concurrent term of imprisonment for six months and a $20,000 fine (App. 3-7, 59-60). The court of appeals affirmed (Pet. App. A).

The transaction which gave rise to the charges in this case was initiated by the government. The evidence showed that petitioners, partners in the New York accounting firm of Stern and Lehrer, on repeated prior occasions, had bribed an auditor for the Internal Revenue Service to give preferential treatment to their clients.[1] In September 1966, the Service

[1] A former Internal Revenue Service auditor, who had pleaded guilty and served his sentence for receiving bribes to give favorable audits on income tax returns, testified that petitioners had bribed him on approximately eighteen occasions (Tr. [illegible]). One of petitioners' former clients testified in detail as to paying them for special handling of his returns in addition to the regular fees charged (Tr. 344, 350-351, 354-357).

was investigating the official conduct of one of its agents, Sidney Romanoff. To get confidential information about this investigation, Romanoff approached an inspector, not knowing that the inspector was a criminal investigator who was working undercover to investigate corruption in the New York office. The inspector, Wenig, sold Romanoff some information for $200 (Tr. 205–208).

Wenig later told Romanoff that he was investigating petitioners and their partner Stern (Tr. 73–75, 214).[2] Romanoff said that they were good friends of his and asked if Wenig could help them (Tr. 75, 215). Wenig said that he had information on them which would be worth a thousand dollars. Romanoff contacted petitioner Braver, who reported that he had talked with petitioner Lehrer, and that they would pay five hundred dollars for the information (Tr. 76–80, 219–220A). Subsequent meetings between Romanoff and both petitioners resulted in the payment of the promised sum (Tr. 91–98, 222–223, 236–249, 256, 333–334).

Petitioner excepted to the court's instruction on entrapment[3] on the ground that it was confusing and imposed an improper burden on the accused (Tr. 619–

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[2] Stern, against whom no charges were made, was an entirely and inactive member of the firm (Tr. 68–69).

At the time of trial Romanoff who testified for the government, had pleaded guilty to charges of conspiring to bribe Wenig (Tr. 188–189).

[3] The court instructed (Tr. 611–612):

The defendant asserts the defense of entrapment. The defense of entrapment is based upon the policy that law enforcement agencies cannot manufacture crime. They cannot tempt innocent

620). On appeal, the court held that the instruction was in line with the authorities in the Second Circuit but also recognized that a charge giving the jury two

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people into committing a crime in order to prosecute them. But a line must be drawn between the entrapment of the unwary innocent and the trap for the unwary criminal. Law enforcement agencies often use undercover investigations and informants in attempting to enforce law. Such methods are not in any way forbidden by law. Stealth and strategy are often necessary weapons in the detection and prosecution of crime. Whether or not you personally agree with the policy of using such methods is not an issue. Whether or not you agree with the policy of using co-conspirators like Romanoff or former criminals like Fanella, it is proper and the government must take such witnesses as there are to a transaction. It often has no choice and were it not for the use of such people, such methods, many crimes would go undetected and unprosecuted.

The question of entrapment involves two issues. The first issue is whether the defendant was led or induced to commit the crime by anyone acting for the government. That is, did the government initiate the criminal transaction. On this issue the defendant has the burden of proof. He does not have to prove it beyond a reasonable doubt but he must prove it by a fair preponderance of the evidence. That is, he must satisfy you that it is more likely than not that the government initiated the criminal transaction involved in this case. If you do not find such inducement then there was no entrapment, but if you do find such inducement then you must consider the second issue.

The second issue is whether the defendant was ready and willing to commit the crime without persuasion. This is sometimes expressed as an issue of whether he had a propensity to commit the crime. On this issue the government has the burden of proof and it must prove it beyond a reasonable doubt. Here you must determine again the defendant's state of mind. Was he looking for an opportunity—was it propitiously the right moment to violate the law, to make a payoff? Was he ready and willing to commit the crime whenever he had a good opportunity so that all the government had to do was to suggest it?

ultimate factual issues to be decided according to two different burdens of persuasion was unduly complex. While refusing to hold the instruction erroneous in this case, the court suggested that in the future it would be preferable to tell the jury that "if it finds some evidence of government initiation of the illegal conduct, the Government has to prove beyond a reasonable doubt that the defendant was ready and willing to commit the crime" (Pet. App. A 11).

ARGUMENT

In this case, it is admitted and undisputed that the government initiated the particular transaction which occasioned the bringing of these charges. Both Romanoff, who made the contact with petitioners, and Wenig, who guided him in so doing, testified unequivocally that it was the government who initiated the approach and suggested the bribe. Thus, the giving of the bifurcated entrapment instruction theretofore approved in the Second Circuit could not have prejudiced petitioner. The jury was correctly instructed on the only disputed issue—petitioners' readiness to commit the crime—that the government had the burden of proof beyond a reasonable doubt.

The court below therefore was fully justified in affirming the conviction at the same time that it suggested for the future a formulation which would simplify entrapment instructions in line with the rule prevailing in other circuits.[1] Since the rule now pre-

[1] Petitioners were not deprived of the benefit of any new rule announced in this case. In the first place the court did not find the charge as given erroneous. Moreover since inducement by

vailing in the Second Circuit is in accord with the position of other circuits, there is no conflict requiring resolution by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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the government was admitted, petitioner adequately made that showing, whatever the proper standard.

In any event a wholly prospective ruling would not be a deprivation of due process. The Court has said that the Constitution neither requires nor prohibits retrospective effect. *Linkletter* v. *Walker*, 381 U.S. 618, 629; *Tehan* v. *Shott*, 382 U.S. 406, 410; *Johnson* v. *New Jersey*, 384 U.S. 719.

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